Supreme Court, U.S.
FILED
JAN 13 1997

No. 96-491

In the Supreme Court of the United States

OCTOBER TERM, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, ET AL.,
PETITIONERS

v.

ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140, makes it unlawful for any person to take specified adverse action against an employee benefit plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." The question presented is:

Whether Section 510 applies to an employer's decision to discharge employees and to contract out their jobs to another company for the purpose of interfering with the employees' attainment of rights to welfare benefits.

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INTEREST OF THE UNITED STATES

This case raises an important issue concerning the interpretation of Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1140. The Secretary of Labor is authorized to bring actions to redress violations of Section 510, see 29 U.S.C. 1132(a)(5), and to intervene in such actions brought by private parties, see 29 U.S.C. 1132(h).

STATUTORY PROVISION INVOLVED

Section 510 of ERISA, 29 U.S.C. 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, "is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). Section 510 of ERISA, 29 U.S.C. 1140, is a central component of the Act's protections of employee benefits. Section 510 protects employee benefit plan participants from retaliation for exercising rights to which they are entitled under their employee benefit plans, and it prohibits "discharge" of a

participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. 1140. "Congress viewed [Section 510] as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 143 (1990); see also *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993).[1]

ERISA defines the term "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan," or a plan which is both. 29 U.S.C. 1002(3). A welfare plan is a plan that, "through the purchase of insurance or otherwise," provides "(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. 1002(1). A pension plan is "any plan, fund, or program [that] * * * (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. 1002(2)(A).[2] Disability coverage can be provided

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[1] Participants and beneficiaries are authorized to file civil actions to obtain relief for violations of Section 510 under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), and the Secretary is authorized to bring such actions under Section 502(a)(5), 29 U.S.C. 1132(a)(5).

[2] ERISA divides pensions into one of two types: defined contribution plans and defined benefit plans. In a defined con-

through either a welfare or a pension plan. See 29 U.S.C. 1002(1); 29 C.F.R. 4022.21(a)(2)(ii), 4022.6(a). Severance pay benefits and cost-of-living retirement supplements also can, under specified circumstances, be treated either as welfare or pension plans. See 29 U.S.C. 1002(2)(B).[3]

ERISA regulates the accrual and vesting of pension benefits. Accrual refers to the manner in which an employee earns increased benefits over time. See 29 U.S.C. 1002(23) and (29). Every pension plan must define its accrual method consistent with ERISA's specifications. 29 U.S.C. 1054. Vesting refers to the method by which benefits become nonforfeitable. See 29 U.S.C. 1002(19) and (25); see *Hazen Paper*, 507 U.S. at 611. ERISA requires that a pension plan provide for vesting at least by the time an employee has completed five years of service, 29 U.S.C. 1053(a)(2)(A),[4] or, if the plan provides for "incremental" vesting, pension benefits must, at a minimum, vest at a rate of 20% per year beginning when the employee has completed three years of service, 29 U.S.C. 1053(a)(2)(B). Vesting gives an employee a nonforfeitable right to benefits accrued, and, once the employee is fully vested, additional accruals are gained on a nonforfeitable basis.

tribution plan, the employer makes contributions into accounts established on behalf of individual employees, and the value of the pension benefit is the sum of the contributions plus any investment returns. 29 U.S.C. 1002(34). Defined benefit plans are all other pension plans. 29 U.S.C. 1002(35). Defined benefit plans generally pay a dollar amount at retirement based upon a formula, which usually takes into account the employee's age, years of service, and average salary during the final years of service.

[3] With respect to pension plans, but not welfare plans, see 29 U.S.C. 1051(1), 1081(a)(1), Congress established minimum funding, participation and vesting requirements, as well as an insurance program to pay benefits promised by employers who become insolvent. 29 U.S.C. 1051-1061, 1081-1086, 1301-1461.

[4] Multi-employer plans, in contrast, are required to provide for vesting by the time an employee has completed ten years of service. 29 U.S.C. 1053(a)(2)(C).

In contrast to pension benefits, welfare benefits typically are funded on a "pay-as-you-go" basis. ERISA does not require vesting of welfare benefits and does not regulate their accrual. For example, whether an employer self-insures for the costs of employee medical care or purchases insurance, the employer ordinarily pays for treatments or pays premiums for current employees during the period of their employment. Welfare benefits may also, however, have contractually imposed minimum years-of-service eligibility criteria analogous to the criteria for accrual or vesting of pension benefits. For example, employees may be eligible under the terms of the plan for severance pay, health benefits during their retirement, disability benefits, or supplemental retirement income benefits only if they have worked for the employer a minimum number of years.

2. Petitioners are five former employees of respondent Santa Fe Terminal Services (SFTS), a wholly owned subsidiary of respondent Atchison, Topeka and Santa Fe Railroad (Atchison). Pet. App. 5a, 7a, 22a-23a (¶¶ 8-9), 24a (¶ 13).[5] SFTS performed "inter-

[5] A sixth plaintiff, Inter-Modal Rail Employees Association (IMREA), is a non-profit mutual benefit corporation formed by former employees of SFTS to conduct this litigation. Pet. App. 22a (¶ 6). The court of appeals held that IMREA lacks standing. *Id.* at 6a. Although petitioners sought review of that holding (see Pet. i (Question 2)), this Court's grant of certiorari did not include that issue.

modal" (loading and unloading) work exclusively for Atchison at its Hobart rail yard. *Id.* at 25a (¶ 15). SFTS employed approximately 200 persons at the Hobart Yard. *Id.* at 23a (Compl. ¶ 12).[6]

While employed by SFTS, petitioners were covered by a Teamsters' Union employee benefit program adopted pursuant to a collective bargaining agreement with the Teamsters' Union. Pet. App. 26a (¶ 19). The employee benefits included a health and welfare plan, a pension plan, and a supplemental benefit plan. *Ibid.* SFTS made substantial contributions on petitioners' behalf to those benefit funds. *Ibid.* In addition, petitioners were covered by the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*, and SFTS made required contributions on their behalf to the Railroad Retirement Board. Pet. App. 7a, 26a (¶ 19).

From 1974 to 1990, SFTS performed Atchison's intermodal work at the Hobart Yard subject to Atchison's day-to-day management and control. Pet. App. 23a (¶ 9), 25a (¶¶ 15-16). On January 1, 1990, Atchison and SFTS for the first time entered into a written contract for the intermodal work. *Id.* at 26a (¶ 21). The contract provided that Atchison could terminate it in the event that SFTS's services became unsatisfactory. *Ibid.* During January 1990, SFTS management met with petitioners to assure them of their job security and to outline SFTS's plans to become "the leading 'piggy-back' and container hauler in the country." *Id.* at 26a (¶ 20). In February 1990, however, Atchison terminated its contract with SFTS and solicited bids for the work. *Id.* at 27a (¶¶ 22-23). On March 16, 1990, Atchison awarded the contract to respondent In-Terminal Services, Division of Mi-Jack Products, Inc. (ITS). *Id.* at 27a (¶ 26). Three days later, ITS informed petitioners that it had been awarded the contract to operate the Hobart Yard facility, and ITS and Atchison invited petitioners to apply for positions with ITS. *Ibid.* SFTS then sold its Hobart Yard assets to ITS for a nominal sum on concessional credit terms and discharged its employees, including petitioners. *Id.* at 27a (¶¶ 25, 27). ITS thereafter hired petitioner Franks and many other former SFTS employees to perform the same work they had previously performed for SFTS. *Id.* at 28a (¶ 29).

ITS, which the Railroad Retirement Board found was not an "employer" covered by the Railroad Retirement Act of 1974, does not make contributions to the Railroad Retirement Board. Pet. App. 28a, 29a (¶¶ 30, 32). Managers of respondents Atchison and SFTS told petitioners that the reason they had contracted out the intermodal work was to avoid making contributions to the Railroad Retirement Board. *Id.* at 28a (¶¶ 28, 31). In addition, petitioners receive lower contributions to and benefits from their pension plan and their health and welfare plan as the result of their discharge from SFTS and reemployment by ITS. *Id.* at 28a, 29a, 30a (¶¶ 30, 33, 38).

3. Petitioners brought this action in the United States District Court for the Central District of California, alleging that respondents violated Section 510 of ERISA by conspiring to discharge them "for the express purpose of depriving [petitioners] of most,

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[6] This case was decided on respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and the allegations of petitioners' complaint therefore must be taken as true. The facts in this Statement are based on the allegations in the complaint.

if not all of the substantial, ERISA-protected 'fringe' benefits of their employment with SFTS." Pet. App. 30a (¶ 37); see also *id.* at 7a, 29a (¶ 33). The district court, without written opinion, granted respondents' motion to dismiss the Section 510 allegations for failure to state a claim. *Id.* at 16a-17a.[7]

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-15a. The court reversed the district court's dismissal of the Section 510 claim insofar as it was based on alleged interference with petitioners' attainment of rights to pension benefits. The court held that because ERISA "'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting,'" petitioners "clearly stated a claim under section 510." Pet. App. 8a (quoting *Ingersoll-Rand*, 498 U.S. at 143).[8] Respondents did not seek review of that holding with respect to interference with pension benefits.[9]

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[7] Petitioners also brought class action claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, alleging that Atchison and SFTS unlawfully exposed class members to harmful levels of noise and toxic chemicals. Pet. App. 30a-35a (¶¶ 41-56). The district court dismissed those claims as well. *Id.* at 17a. The court of appeals remanded for consideration of the class claims. *Id.* at 12a-13a. Respondents did not seek review of the court of appeals' disposition of the FELA claims.

[8] The court rejected respondents' contention that "incidental or consequential loss of future, unaccrued pension benefits is not actionable," concluding that "questions of motivation and intent are not to be resolved at the pleading stage." Pet. App. 8a.

[9] The court affirmed the dismissal of petitioners' Section 510 claim of interference with attainment of retirement benefits governed by the Railroad Retirement Act of 1974, reasoning that plans covered by that Act are "governmental plan[s]" excluded from ERISA coverage. Pet. App. 9a-12a. Although petitioners sought review of that holding (Pet. i (Question 1)), the Court's grant of certiorari did not include that question.

By contrast, the court of appeals affirmed the dismissal of petitioners' Section 510 claim insofar as it was based on interference with petitioners' welfare benefits. Pet. App. 8a-9a. The court observed that, "[u]nlike pension benefits, welfare benefits do not vest," and that an employer accordingly may unilaterally amend or eliminate welfare benefits without considering its employees' interests. *Id.* at 8a. Because, in its view, "existence of a present 'right' is prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits," the court of appeals concluded that no claim lies under Section 510 for interference with attainment of rights to welfare benefits. *Id.* at 9a. The court acknowledged that other courts of appeals have reached a contrary conclusion and have held that "[t]he validity of a § 510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge," *id.* at 8a n.6 (quoting *Seaman* v. *Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir.), cert. denied, 510 U.S. 916 (1993)), and that "[t]he emphasis of a Section 510 action is to prevent persons and entities from taking actions which might cut off or interfere with a participant's ability to collect present or future benefits," *ibid.* (quoting *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992)).

SUMMARY OF ARGUMENT

1. Petitioners have stated a claim under Section 510 of ERISA of "interfer[ence] with the attainment of a[] right" to which they might have "become entitled" under their employee welfare benefit plan. In rejecting that claim, the court of appeals erroneously reasoned that Section 510 covers only rights to pension or vested benefits, and that, because welfare benefits do not vest, employees lack any "right" to the "future, anticipated" attainment of such benefits within the meaning of Section 510. The text of Section 510 cannot be squared with that construction. It expressly applies to "employee benefit plan[s]," which ERISA defines to include both pension plans and welfare plans. Section 510 also is not limited to vested rights, or to rights capable of vesting, but refers to "any right." Finally, Section 510 cannot be limited to pension benefits on the ground that only such rights are subject to statutory vesting and accrual under ERISA, because Section 510 protects contractual rights conferred under a "plan" as well as statutory rights guaranteed by ERISA.

2. There likewise is no merit to the court of appeals' suggestion that welfare benefits are not covered by Section 510 because employers retain rights to amend or terminate welfare benefit plans that they lack with respect to pension plans. The established power to amend or terminate a plan, which can result in a prospective loss of welfare benefits, does not abrogate Section 510's express prohibition against discharging employees (or taking other adverse action against them) to achieve the same end *without* amending or terminating the plan. Section 510 reflects Congress's judgment that an employee's job should not be placed at risk based on an employer's acceptance of what turn out to be overly burdensome welfare benefit obligations. The proper way for employers to reduce benefits-related costs is to amend or terminate the plan, according to the procedures prescribed in ERISA and the plan itself.

3. Section 510 requires allegations of a specific intent to interfere with benefit rights to which a participant may become entitled. Petitioners adequately alleged that their discharges were in fact motivated by respondents' desire to deprive them of welfare benefits, in violation of Section 510. The court of appeals found those allegations of intent sufficient to support petitioners' pension benefits-related claim, and respondents have not cross-petitioned to challenge that holding. There is no reason why the same allegations should not suffice to support the parallel claim based on interference with rights to welfare benefits.

ARGUMENT

SECTION 510 OF ERISA PROHIBITS THE DISCHARGE OF EMPLOYEES FOR THE PURPOSE OF INTERFERING WITH THEIR ATTAINMENT OF RIGHTS UNDER AN ERISA-COVERED EMPLOYEE WELFARE BENEFIT PLAN

The court of appeals erred in holding that Section 510 of ERISA is categorically inapplicable to claims of interference with the attainment of rights under an employee welfare benefit plan. The court held that petitioners "clearly stated a claim under section 510" insofar as their pension benefits are concerned, but distinguished their otherwise identical claim of interference with attainment of welfare benefits on the ground that, unlike pension benefits, welfare benefits

do not vest and therefore cannot constitute present "rights" to benefits protected by Section 510. Pet. App. 8a-9a. The court's decision limiting Section 510 protection to pension benefits, or to vested rights, is insupportable and should be reversed.

1. The text of Section 510 makes no distinction between pension and welfare benefits. It refers generically to rights under "employee benefit plan[s]," and prohibits interference with the attainment of rights to which a person may become entitled under such a "plan." 29 U.S.C. 1140. ERISA defines the term "employee benefit plan" or "plan" as "an employee welfare benefit plan or an employee pension benefit plan" (or a plan which is both). 29 U.S.C. 1002(3). Thus, under Section 510, "'[p]lan' includes both pension and welfare plans." *Heath* v. *Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995); see, *e.g.*, *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1243 (7th Cir. 1983) (applying Section 510 to claim of discharge for the purpose of interfering with rights under medical, dental and life insurance plans).

In distinguishing welfare benefits from pension benefits, the court below relied on the fact that, "[u]nlike pension benefits, welfare benefits do not vest." Pet. App. 8a. According to the court, "existence of a present 'right' is prerequisite to section 510 relief, and employees have no present 'right' to future, anticipated welfare benefits." *Id.* at 9a. The court's limitation of Section 510 to statutorily vested rights cannot, however, be squared with the statutory text. Section 510 expressly prohibits interference with the attainment of "*any* right to which [a] participant may become entitled." 29 U.S.C. 1140 (emphasis added), not merely vested rights. If Congress had intended to limit Section 510's coverage in the

manner the court of appeals believed, "it easily could have referred to 'vested rights.'" *Conkwright* v. *Westinghouse Elec. Corp.*, 933 F.2d 231, 237 (4th Cir. 1991).[10] Section 510 is therefore correctly read to provide that "an employer may not discharge employees to prevent them from taking advantage of benefits even if those benefits are not yet vested." *Seaman* v. *Arvida Realty Sales*, 985 F.2d 543 (11th Cir.), cert. denied, 510 U.S. 916 (1993).

Consistent with Section 510's reference to "any right," the courts of appeals have rejected an interpretation of Section 510 that would deny its protection to rights that will vest in the future. They have thus uniformly held that Section 510 protects employees whose pension benefits have already vested from discharges designed to prevent them from becoming eligible to obtain additional benefits in the future. See, *e.g.*, *Heath*, 71 F.3d at 257-259 (discharge did not affect vested pension, but Section 510 triggered because discharge rendered employee ineligible

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[10] A principal sponsor of the legislation, introducing the Conference Report on the Senate floor, explained that Section 510 provides protection for employees by prohibiting "discharge, or other discriminatory conduct toward participants and beneficiaries which is designed to interfere with attainment of *vested benefits or other rights* under the bill." 120 Cong. Rec. 29,933 (1974) (Sen. Williams) (emphasis added). The court of appeals' interpretation cannot be squared with that explanation of Section 510.

There is, by contrast, nothing in the legislative history that suggests that Section 510 prohibits only interference with the attainment of pension benefits, or benefits subject to vesting. See generally Staff of Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976).

for early retirement package); *Seaman*, 985 F.2d at 545 (discharge did not affect contributions already made under 401(k) plan, but Section 510 prohibited discharge for purpose of interfering with health insurance coverage and future participation in 401(k) plan); *Conkwright*, 933 F.2d at 236-238 (Section 510 gives fully vested employees a cause of action against employers who take adverse action in order to prevent accrual of additional pension benefits); *Dister* v. *Continental Group, Inc.*, 859 F.2d 1108, 1110-1111, 1115 (2d Cir. 1988) (employee with vested basic pension rights had prima facie case under Section 510 of interference with ability to earn additional pension benefits); see also *Kross*, 701 F.2d at 1242-1243 (rejecting argument that, because employee was already a participant in medical and dental insurance plans, his discharge could not interfere with his attainment of rights under those plans). There is no relevant distinction under Section 510 between non-vested employees' rights to welfare benefits and vested pension beneficiaries' rights to accrue additional benefits; in either case, the employer could prevent the accrual of additional benefits by amending the plan on a prospective basis. See pages 18-21, *infra*.

Section 510's explicit protection of rights to which a participant "may become entitled" further confirms that interference with the attainment of future, anticipated benefits is not, as the court of appeals held, excluded from its scope. The quoted phrase demonstrates that Section 510 protects not only rights to which a participant is *already* entitled, but also "permits suits for interfering with rights not yet earned." *Conkwright*, 933 F.2d at 237. Indeed, discharging *non*-vested employees in the *anticipation* that they are about to attain vested rights is a quin-

tessential Section 510 violation. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 143 (1990).[11] By the same token, the terms of Section 510 plainly bar the discharge of an employee for the purpose of preventing him from making future claims for welfare benefits to which the employee would become entitled had he remained employed. See, *e.g.*, *Shahid* v. *Ford Motor Co.*, 76 F.3d 1404, 1411 (6th Cir. 1996) (right to participate in voluntary termination plan in the future is a right to which an employee "may become entitled," and is thus covered by Section 510 even though it is not a right that vests); *Kross*, 701 F.2d at 1241-1243 (rights to continued participation in life and medical insurance plans are covered by Section 510).

Reading Section 510 to prohibit interference with a participant's future entitlement to welfare benefits is essential to serving the congressional purpose underlying the provision. If the attainment of future benefits under an existing welfare plan were not protected from interference, an employer would be free to discharge employees because it believed they were likely to claim benefits under the plan. For example, under the court of appeals' reasoning, an employer could, consistent with Section 510, dis-

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[11] The comments of legislators supporting the legislation cited discharge of employees about to vest in their pensions as an example of conduct Congress intended to proscribe by enacting Section 510. See, *e.g.*, 119 Cong. Rec. 30,044 (1973) (Sen. Javits); 120 Cong. Rec. 29,935 (1974) (same). As Senator Hartke stated, "[t]he key to effective pension reform is early vesting, but a vesting provision is no better than the protection employees have against improper discharge—including layoff—discipline or other discrimination that puts an employee out of a job before vesting is achieved, thereby defeating his pension claim." 119 Cong. Rec. 29,563 (1973).

charge an employee who it knew needed surgery, for the purpose of preventing the employee from making a claim for surgical coverage under a health benefits plan—or could discharge a terminally ill employee in order to prevent him from attaining a death benefit. The reasoning of the court below would also permit an employer to discharge the group of employees who had filed the most claims under the employer's health plan during the previous year, based on projections that those employees would file the most claims in the future.[12] In each of those circumstances, the discharge would allow the employer to circumvent promises that it had made in its benefit plan. Section 510's reference to benefits to which an employee "*may become* entitled" makes clear that the discharge of employees for those purposes is precisely the evil that Section 510's interference clause was designed to prevent.

Section 510 also cannot, consistent with its terms and this Court's precedents, be limited to protecting rights that, although not yet vested, are subject to accrual or vesting under ERISA itself. The section expressly protects not only rights that a participant may attain under "this subchapter" of ERISA—such as statutory rights to pension vesting, or statutory anti-cutback rights against the reduction of accrued benefits, see 29 U.S.C. 1054(g); *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1036-1037 (7th Cir. 1996)—but more

[12] Similarly, under the court's reasoning, an employer that had contractually bound itself to pay health benefits to retired employees for life, see, *e.g.*, *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 604-605 (7th Cir.) (en banc), cert. denied, 510 U.S. 909 (1993), could, consistently with Section 510, render such benefits illusory by firing employees before they reached retirement age.

broadly protects all rights that a participant may attain under a "plan." Thus, Section 510, like ERISA generally, protects contractually defined rights to benefits, as well as statutory rights such as the vesting and accrual rights guaranteed by the Act. Cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989) ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans' and 'to protect contractually defined benefits'") (citation omitted). Section 510 applies to "promised benefits," *Ingersoll-Rand*, 498 U.S. at 143, as well as those that are statutorily required. For example, in the pension context, although ERISA generally requires that the right to a pension benefit must vest after five years, 29 U.S.C. 1053(a)(2)(A), an employer may adopt a more generous plan providing for full vesting after three years. An employer's discharge of an employee shortly before she has attained three years of service—for the purpose of preventing her attainment of her contractual right to vest—runs afoul of Section 510 just as clearly as does a discharge for the purpose of preventing vesting under a plan adopting the statutory-minimum five-year schedule. In the welfare benefits context, a discharge motivated by the desire to prevent an employee from taking advantage of non-pension disability, severance, or health benefits similarly violates Section 510.

2. Contrary to the court of appeals' suggestion (see Pet. App. 8a-9a), the right to amend or terminate a welfare benefits plan does not remove such plans from Section 510 coverage. To be sure, ERISA does not preclude a plan sponsor, as settlor of a plan trust, from terminating or amending a welfare plan (unless the employer has promised not to do so). 29 U.S.C. 1343(c); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115

S. Ct. 1223, 1228 (1995); *Owens* v. *Storehouse, Inc.*, 984 F.2d 394, 396-398 (11th Cir. 1993); *McGann* v. *H & H Music Co.*, 946 F.2d 401, 405-408 (5th Cir. 1991), cert. denied, 506 U.S. 981 (1992); see also 29 U.S.C. 1051(1) (exempting welfare plans from ERISA's vesting and participation requirements). But as Judge Easterbrook has observed, "[t]he greater power to abolish the plan" does not include "the lesser power to deny benefits to particular persons." *Heath*, 71 F.3d at 257.[13] The mere fact "[t]hat [the employer], by

[13] *Heath* reversed a district court decision that relied, as did the court of appeals here, on the power to amend or terminate welfare benefit plans as a basis for excluding rights under such plans from Section 510 coverage. The Seventh Circuit persuasively rejected that rationale:

> The district court thought that the statute as a whole contains a contradiction: why must an employer that is free to modify or abolish a plan ensure that each employee receives its full benefits? To resolve this supposed contradiction the district court limited § 510 to the sort of benefits that an employer cannot affect by changing or abrogating the plan. Yet a court should endeavor to apply all parts of a statute whenever possible. * * * Legislation reflects compromise among competing interests. That employers won a battle and secured the right to modify plans, while employees prevailed in a different skirmish and secured the right to qualify for benefits under existing plans, shows no more than that each side could claim some victories. It upsets the legislative balance to push the outcome farther in either direction. Just as a court should not use § 510 and ERISA's other fiduciary obligations to curtail the employer's right to modify a plan, so a court should not use the employer's power to amend as a reason to curtail § 510.

71 F.3d at 258 (citation omitted). See also *Shahid*, 76 F.3d at 1412 ("According to the balance struck by Congress, employees' reliance on ERISA plans is protected until an employer

changing the terms of its plan, lawfully could have deprived its [employees] of these benefits does not allow it to offer benefits but prevent its [employees] from taking advantage of those benefits on pain of discharge." *Seaman*, 985 F.2d at 547. For example, it might not violate Section 510 to amend a plan prospectively to eliminate coverage of certain health conditions, see *H & H Music Co.*, *supra*,[14] but it would violate Section 510 to discharge employees known to have those health conditions while continuing to maintain a plan purporting to provide such coverage.

There are sound reasons why ERISA generally permits plan sponsors to amend welfare plans prospectively to modify the types or levels of benefits provided, but at the same time prohibits taking adverse employment actions against participants to prevent them from attaining rights under such plans. By declining to subject employee welfare plans to statutory vesting requirements, Congress provided employers with flexibility that would permit them to offer generous benefits, without fearing that they would be "stuck with terms that in retrospect proved to be excessively costly." See *Heath*, 71 F.3d at 258; see also H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974) (vesting requirements for welfare plans would

complies with the applicable amendment or termination procedure.") (footnote omitted).

[14] Such action might, however, violate other state or federal laws, such as the Americans with Disabilities Act of 1990, 42 U.S.C. 12112(a) (prohibiting discrimination against persons with disabilities with respect to compensation and "other terms, conditions, and privileges of employment"). See U.S. Amicus Br. in *Greenberg* v. *H & H Music Co.* at 8, 17-18 (No. 91-1283).

seriously complicate administration and increase cost of such plans).

On the other hand, Section 510 is one of the standards of conduct that Congress imposed in order to ensure that the furnishing of employee benefits, once undertaken, is fair and ordered. ERISA's incorporation of fiduciary standards ensures that plan administrators and others manage plan assets prudently and in the sole interest of participants, and that participants' claims for benefits are evaluated impartially and in accordance with plan provisions. *Heath*, 71 F.3d at 258; see ERISA §§ 403(c) and 404, 29 U.S.C. 1103(c) and 1104; *Varity Corp.* v. *Howe*, 116 S. Ct. 1065, 1074-1075, 1078-1079 (1996). Section 510 complements those provisions by ensuring that persons with power over participants' employment do not take employment actions against them that prevent the terms of the plan from being realized. Thus, Section 510 "makes employers' promises of benefits credible" and, along with other ERISA provisions, protects "employees' reliance on ERISA plans * * * until an employer complies with the applicable amendment or termination procedure." *Shahid*, 76 F.3d at 1412; see also *Heath*, 71 F.3d at 258.

This Court recently recognized that "proposed plan amendments" are "fairly serious events" that must be "given the special consideration they deserve." See *Curtiss-Wright*, 115 S. Ct. at 1230; see also *Heath*, 71 F.3d at 259 (referring to need to "use[] the amendment procedure laid out in the plan or proper under general corporate law"). Amendment or abolition of plans must follow any plan and statutory procedures regulating such changes. The allegations of the complaint in this case support an inference that Atchison sought to contract out its Hobart Yard work to ITS in

order to avoid its obligations to the Hobart Yard employees under the collectively bargained Teamsters' employee benefit program without negotiating an amendment to that program. Section 510 should be read to reinforce rather than undermine the prerequisites for plan amendments and terminations.

3. Respondents asserted below that any interference with petitioners' ERISA-covered benefits was a mere consequence of, as opposed to a motivating factor behind, petitioners' discharge. Atchison & SFTS C.A. Br. 10; ITS C.A. Br. 9; Resp. Br. in Opp. 6 ("[N]o court has ever held that a Section 510 claim can be established based on a mere reduction in employee benefits resulting from a lawful change in contractors."). That assertion, however, does not support affirmance of the dismissal of petitioners' claim of interference with their attainment of rights under the welfare plan.

We agree with respondents that a specific intent to interfere with a participant's rights is a necessary element of a Section 510 claim, and the courts of appeals have uniformly so held. See, *e.g.*, *Shahid*, 76 F.3d at 1411; *Conkwright*, 933 F.2d at 238; *Unida* v. *Levi Strauss & Co.*, 986 F.2d 970, 979-980 (5th Cir. 1993); *Dytrt* v. *Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 895-896 (9th Cir. 1990); *Dister*, 859 F.2d at 1111; *Gavalik* v. *Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), cert. denied, 484 U.S. 979 (1987). Where a decision to discharge a large group of employees—such as in connection with a plant closing or a decision to contract out work—is motivated by a desire to save money, the employer may usually be indifferent to whether its savings will result from lower benefits costs or from other factors. In such a case, the employer likely would lack the requisite intent to

support a Section 510 claim. See, *e.g.*, *Unida*, *supra*. Where, however, there is evidence that an employer has contracted out its work, and thus discharged its employees, for the specific purpose of escaping obligations to pay benefits, the intent requirement is met. See, *e.g.*, *Seaman*, *supra*; *Gavalick*, *supra*.

This case was decided on a motion to dismiss the complaint for failure to state a claim, which must be denied unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Petitioners allege that respondents entered into a scheme to interfere with their employment relationship with SFTS—in essence, to effect their discharge from SFTS—in order to deprive them of ERISA-covered pension and welfare benefits. Pet. App. 29a (¶ 33), 30a (¶¶ 37, 38). Those allegations clearly state a claim under Section 510, as the court of appeals recognized in reversing the district court's dismissal of the complaint insofar as it alleged interference with petitioners' rights under the pension plan. See *id.* at 8a. And as the court of appeals further recognized in reinstating that claim, "questions of motivation and intent are not to be resolved at the pleading stage." *Ibid.*

The court of appeals reached a different result with respect to petitioners' claim of interference with their welfare benefits only because it believed that the non-vested nature of those benefits took them outside the protection of Section 510. As we have explained above, that conclusion is erroneous.

Respondents did not file a cross-petition for a writ of certiorari to challenge the determination that unlawful intent had been adequately pleaded in support of petitioners' claim of interference with their rights

under the pension plan. That claim therefore has been remanded to the district court for further proceedings. Because the allegations of unlawful intent that support petitioners' claim of interference with their welfare benefits are identical, the welfare benefits claim should also be reinstated and remanded for further proceedings in the district court.[15]

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[15] In the context of an organizational change such as a decision to sell or close down an operation, the District of Columbia Circuit requires Section 510 plaintiffs to show—in addition to a motive specifically to interfere with the attainment of benefits—a targeting of particular employees. *Andes* v. *Ford Motor Co.*, 70 F.3d 1332, 1337-1338 (1995). The *Andes* court reasoned that the term "discharge" in Section 510 refers only to individualized "discriminatory, viz targeted, actions," and does not generally apply to discharges that are part of "a corporate organizational change," because the statutory terms "discharge, fine, suspend, expel, discipline, [and] discriminate" are "all words that connote actions aimed directly at individuals." *Id.* at 1337. If Congress had intended Section 510 routinely to apply to such decisions, the D.C. Circuit stated, "it would surely have included the terms 'layoff' and 'termination.'" *Id.* at 1337-1338. *Andes* thus held that, "as applied to sale or closure of an entire unit, the plaintiffs can satisfy § 510 only by showing that some ERISA-related characteristic special to the unit * * * was essential to the firm's selecting the unit for closure or sale." *Id.* at 1338.

We do not believe that the term "discharge" in Section 510 can properly be read in such a limited fashion. In any event, petitioners' claim was dismissed at the pleading stage, and, because the *Andes* standard does not apply in the Ninth Circuit, it remains unclear whether, had they been confronted with the question, petitioners could have alleged that respondents' discharge and contracting-out decisions were motivated by "some ERISA-related characteristic special to" the Hobart Yard employees. At this stage, the precise nature of the welfare benefits at issue remains unclear, as do the relative expectations of Hobart Yard employees and other Atchison employees regard-

CONCLUSION

The judgment of the court of appeals, to the extent it affirms the dismissal of petitioners' Section 510 claim based on interference with respondents' attainment of rights to welfare benefits, should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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JANUARY 1997

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ing their eligibility for those benefits. Given the preliminary state of the proceedings in this case, and the fact that the issue whether petitioners were "discharged" within the meaning of Section 510 was not raised or passed on in the court of appeals nor asserted in the Brief in Opposition, this Court should decline to consider it. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); see also *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").